

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

UNITED STATES OF AMERICA,

NO. CR. S-96-475 FCD

Plaintiff,

V.

MEMORANDUM AND ORDER

ALLEN RAY JORDAN,

Defendant.

-----oo0oo-----

On October 1, 1998, defendant, Allen Ray Jordan

("defendant"), was convicted by a jury of conspiracy to

23 manufacture methamphetamine in violation of 21 U.S.C. §§ 846 and
24 841(a)(1) ("Count 1"), attempt to manufacture methamphetamine in
25 violation of 21 U.S.C. §§ 846, 841(a)(1) ("Count 2"), and
26 maintaining a place for the manufacture of methamphetamine in
27 violation of 21 U.S.C. § 856 ("Count 3"). On April 11, 2000, the
28 court sentenced defendant to a term of life imprisonment.

1 Defendant appealed, and the Ninth Circuit remanded the case for
2 resentencing in light of Apprendi v. New Jersey, 530 U.S. 466
3 (2000). United States v. Jordan, 291 F.3d 1091 (9th Cir. 2002).

4 On January 13, 2003, the court resentenced defendant to 240
5 months for Count 1, and 60 months for both Counts 2 and 3, to run
6 consecutively for a total aggregate sentence of 360 months.

7 Defendant again appealed, and the case was remanded for further
8 consideration in light of Booker v. United States, 125 S. Ct. 738
9 (2005). This court scheduled a status conference for May 31,
10 2005 and requested that counsel for the government and defendant
11 file memoranda identifying the issues raised on remand.

12 Defendant now asserts that he has served in excess of the
13 maximum sentence allowed under Booker, which held that the
14 Guidelines Issued by the United States Sentencing Guidelines
15 ("Guidelines") violated the Sixth Amendment to the United States
16 Constitution by establishing a mandatory system that increased
17 the length of a sentence based on factual findings made by a
18 judge, not a jury. Booker concluded that, under the mandatory
19 Guidelines, "any fact (other than a prior conviction) which is
20 necessary to support a sentence exceeding the maximum authorized
21 by the facts established by a plea of guilty or a jury verdict,
22 must be admitted by the defendant or proved to a jury beyond a
23 reasonable doubt." Id. at 756. According to defendant, after
24 Booker, the maximum lawful offense under the mandatory Guidelines
25 regime in effect when defendant's crimes were committed was 54
26 months. As of May 15, 2005, defendant has been in custody for
27 105 months. Thus, he argues that he has served in excess of the
28 maximum sentence and should be released.

1 The government responds that the remedial portion of the
2 Booker decision invalidated the sections of the Sentencing Reform
3 Act which made the Guidelines mandatory, and held that the
4 sentencing court has discretion, informed by the Guidelines, to
5 impose any sentence within the statutory maximum penalty for the
6 offense of conviction. Id. at 756. Thus, the government
7 concludes, under the remedial Booker decision, defendant can be
8 sentenced to any term up to the statutory maximum, which in this
9 case is 20 years for each offense. (Gov't's Sentencing Mem. Post
10 Booker at 6.)

11 However, according to defendant, the "remedial" portion of
12 the Booker decision "cannot be applied to [defendant] because of
13 the prohibition against Ex Post Facto laws in Article I, section
14 9, clause 3 of the United States Constitution." (Def.'s Mem. of
15 Issues on Resentencing filed March 2, 2005 at 3.) Thus, the
16 question before the court is whether the remedial portion of the
17 Booker decision can lawfully be applied to defendant.

18 The court held a status conference and heard argument from
19 counsel on June 6, 2005.

DISCUSSION

The Ex Post Facto Clause of the United States Constitution provides that "no state shall . . . pass any . . . ex post facto law." U.S. Const. art. I, § 10, cl. 1. By its express terms, the Ex Post Facto Clause limits the power of the legislature to enact laws, not the power of the courts to interpret the law. Frank v. Mangum, 237 U.S. 309, 333-334 (1915) ("as its terms indicate, [the Ex Post Facto Clause] is directed against legislative action only, and does not reach erroneous or

1 inconsistent decisions by the courts.") (citations omitted); Ross
2 v. Oregon, 227 U.S. 150, 161-162 (1913) (same).

3 However, the principle on which the Ex Post Facto Clause is
4 based - that persons have a right to fair warning of that conduct
5 which will give rise to criminal penalties - is "fundamental to
6 our concept of constitutional liberty." Marks v. United States,
7 430 U.S. 188, 191-192 (1977) (citations omitted). Thus, to a
8 limited extent, the Supreme Court applies ex post facto
9 principles to retroactive judicial decisions.

10 In Bouie v. City of Columbia, 378 U.S. 347 (1964), the
11 defendants were convicted of criminal trespass after they refused
12 to leave a department store luncheon counter during a "sit in"
13 protest of the store's policy against serving African American
14 customers. Id. at 348. The statute under which the defendants
15 were convicted defined the prohibited conduct as "entry upon the
16 lands of another . . . after notice from the owner or tenant
17 prohibiting such entry." Id. at 349-350. The South Carolina
18 Supreme Court affirmed the convictions, "construing the statute
19 to cover not only the act of entry . . . but also the act of
20 remaining on the premises of another after receiving notice to
21 leave." Id. at 350. On certiorari, the Supreme Court reversed,
22 finding that the defendants' convictions rested on an unexpected
23 construction of the state trespass statute by the State Supreme
24 Court which expanded the type of conduct sanctioned under the
25 statute. The Court concluded that:

26 [A]n unforeseeable judicial enlargement of a criminal
27 statute, applied retroactively, operates precisely like
28 an ex post facto law, such as Art. I, s 10, of the
Constitution forbids. . . . If a state legislature is
barred by the Ex Post Facto Clause from passing such a

1 law, it must follow that a State Supreme Court is
2 barred by the Due Process Clause from achieving
precisely the same result by judicial construction.

3 Id. at 353-354.

4 The Supreme Court subsequently clarified the analysis to be
5 applied to retroactive judicial decisions in Rogers v. Tennessee,
6 532 U.S. 451 (2001). In Rogers, the defendant appealed his
7 second-degree murder conviction on the ground that the victim had
8 died more than a year and a day after defendant had stabbed him –
9 in violation of the common-law “year-and-a-day” rule. The
10 Tennessee Supreme Court affirmed defendant’s conviction,
11 abolishing the “year-and-a-day” rule and applying its decision
12 retroactively to defendant’s case. The Supreme Court affirmed,
13 holding that judicial abrogation of the “year-and-a-day” rule was
14 not unexpected or indefensible and thus could be applied
15 retroactively without offending the fair warning principles of
16 the Due Process Clause. The Rogers Court explained that, “[t]o
17 the extent petitioner argues that the Due Process Clause
18 incorporates the specific prohibitions of the Ex Post Facto
19 Clause as identified in Calder, petitioner misreads Bouie1 Id.

20 _____
21 ¹ As described by the court in Calder, the categories of
22 prohibited Ex Post Facto laws are:

23 “1st. Every law that makes an action, done before the
24 passing of the law, and which was innocent when done,
25 criminal; and punishes such action. 2nd. Every law that
26 aggravates a crime, or makes it greater than it was,
when committed. 3rd. Every law that changes the
27 punishment, and inflicts a greater punishment, than the
law annexed to the crime, when committed. 4th. Every
28 law that alters the legal rules of evidence, and
receives less, or different, testimony, than the law
required at the time of the commission of the offence,
in order to convict the offender. All these, and

(continued...)

1 at 458. While recognizing that Bouie contains "some expansive
2 language that is suggestive of the broad interpretation for which
3 petitioner argues," the Court reasoned that such language was
4 dicta, as the Bouie decision rested soundly on well established
5 notions of due process. Thus, the court concluded, the
6 limitation on retroactive judicial decisions is not coextensive
7 with the Ex Post Facto Clause, and the specific categories of
8 prohibited legislation outlined in Calder are not incorporated
9 "jot-for-jot" into due process limitations on judicial decisions.
10 Id. at 459 (finding that "incorporation of the Calder categories
11 . . . would place an unworkable and unacceptable restraint on
12 normal judicial processes and would be incompatible with the
13 resolution of uncertainty that marks any evolving legal
14 system").²

15 Instead, the Rogers Court held that retroactive application
16 of a judicial interpretation of a criminal statute or alteration
17 of a common law doctrine of criminal law violates due process
18 where the decision is "unexpected and indefensible by reference
19 to the law which had been expressed prior to the conduct in
20 issue." Id. at 461 (quoting Bouie, 378 U.S. at 354). Thus the
21 question presented here is whether application of the Booker
22 decision to defendant would be "unexpected and indefensible by

23
24 ¹(...continued)

25 similar laws, are manifestly unjust and oppressive."
Calder v. Bull, 3 U.S. 386, 390-391 (1798).

26 ² Defendant repeatedly urges this court to apply Calder
27 and other Ex Post Facto Clause cases here. Rogers clearly holds
28 that such cases, while informed by the same principles, are not
directly applicable to retroactive judicial decisions. Rather,
Rogers itself provides the applicable analytical framework.

1 reference to the law which had been expressed prior to the
2 conduct in issue."³ Id.

3 The Eleventh Circuit recently addressed the precise issue
4 presented here in United States v. Duncan, 400 F.3d 1297 (11th
5 Cir. 2005).⁴ In that case, the defendant was convicted by a jury
6 of conspiracy to distribute and to possess with intent to
7 distribute cocaine and cocaine base. The jury also returned a
8 special verdict in which it found that the conspiracy involved
9 5 kilograms or more of cocaine but found that the government had
10 failed to prove beyond a reasonable doubt that the conspiracy
11 involved 50 or more kilograms of cocaine base. Based solely on
12 the special verdict, the defendant's base offense level would
13 have been 32. However, applying the Guidelines, the district
14 court calculated the defendant's base offense level at 38 by
15 finding that a portion of the cocaine powder had been converted
16 into 12.24 kilograms of cocaine base, or crack. Defendant was
17 sentenced to life in prison, and he timely appealed on various
18 grounds.

19 While his appeal was pending the Supreme Court issued
20 decisions in Blakely v. Washington, 124 S. Ct. 2531 (2004) and

21 ³ Defendant's argument that judicial decisions apply
22 retroactively only if the change in the law is beneficial to
23 the defendant is unsupportable. There is no such per se
24 rule. To the contrary, the Supreme Court has upheld
25 retroactive application of judicial decisions adverse to a
26 criminal defendant so long as the defendant had fair notice
27 of the criminal penalty at the time the crime was committed.
28 See Rogers, 532 U.S. at 461 (affirming retroactive
application of judicial decision abrogating year-and-a-day
rule to criminal defendant who had fair notice of change in
law).

⁴ See also United States v. Gray, 362 F. Supp. 2d 714
(S.D. W. Va. 2005).

1 Booker. After supplemental briefing, the court issued a decision
2 applying Booker. Initially the court found that, because the
3 defendant did not raise a Sixth Amendment argument with the
4 district court, the conviction and sentence would be reviewed for
5 plain error. The court then concluded that no plain error
6 occurred because the same sentence enhancements made by the
7 district court under a mandatory Guidelines system are
8 permissible in the post-Booker non-mandatory Guidelines system.
9 Id. at 1302-1304. As a result, the error did not substantially
10 affect the defendant's rights.

11 Before concluding, the court addressed the defendant's
12 "creative argument" that the remedial portion of Booker, which
13 invalidated the sections of the Sentencing Reform Act which made
14 the Guidelines mandatory, could not be applied to the defendant
15 based on ex post facto principles. The court rejected this
16 argument, finding defendant had ample notice of the consequences
17 of his crime:

18 At the time Duncan committed his offense, 1999-2002,
19 the U.S. Code informed Duncan that if a jury convicted
20 him of possessing at least 5 kilograms of cocaine
powder, he was subject to a sentence of life
imprisonment. See 21 U.S.C. § 841(b) (1) (A) (ii) (I). The
21 Guidelines at the time also informed Duncan that a
judge would engage in fact-finding to determine his
22 sentence and could impose up to a sentence of life
imprisonment. 18 U.S.C. § 3551 et seq. Duncan,
therefore, had ample warning at the time he committed
23 his crime that life imprisonment was a potential
consequence of his actions. Applying the principles
24 announced in Rogers, Duncan's due process rights cannot
25 be said to have been violated.

26 Id. at 1307.

27 The court analogized the defendant's ex post facto argument
28 to one rejected by the Supreme Court in Dobbert v. Florida. In

1 that case, the defendant committed a series of murders in
2 Florida. After the murders, the Florida death penalty statutes
3 were held unconstitutional. However, Florida promptly enacted a
4 new death penalty statute under which the defendant was tried,
5 convicted, and sentenced to death. On appeal, the defendant
6 argued that applying the death penalty statute to him violated ex
7 post facto principles because, at the time of his crimes, no
8 valid death penalty statute was on the books. The Supreme Court
9 rejected this "sophistic argument" concluding that the prior
10 death penalty statute, whether or not constitutionally valid,
11 "provided fair warning as to the degree of culpability to which
12 the State ascribed to the act of murder." Id. (quoting Dobbert,
13 432 U.S. at 297.) The Duncan court noted that the United States
14 Code, which established maximum sentences, similarly provided the
15 defendant with fair warning, at the time he committed his crime,
16 of the maximum penalty for his conduct. That the Guidelines were
17 invalidated after his crime was committed did not obviate this
18 notice.

19 Defendant contends that Duncan is not persuasive because the
20 case involved review for plain error, where here the appropriate
21 standard is harmless error. However, the standard of review
22 applied to review the district court's sentencing decision does
23 not diminish the persuasive value of the court's reasoning on the
24 separate due process question: Whether the remedial portion of
25 Booker can be applied retroactively.⁵

In light of the above, the court concludes that application of the remedial portion of Booker to defendant's conviction does not violate the Due Process Clause of the Fifth Amendment because the decision is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."
Id. at 461 (quoting Bouie, 378 U.S. at 354). At the time defendant committed his offenses (1995-1996), the United States Code informed defendant that, if a jury convicted him of conspiring to manufacture methamphetamine, he was subject to a sentence of 20 years imprisonment on each count. See 21 U.S.C. § 841(b) (1) (C). The Guidelines then in effect also informed defendant that a judge would engage in fact-finding to determine his sentence. See 18 U.S.C. § 3553, et seq. Thus, defendant had ample warning at the time he committed his crime that 20-years imprisonment on each count was the potential consequence of his actions. As a result, a potential sentence of up to 20 years is not "unexpected and indefensible" by reference to the law as expressed prior to the conduct at issue.

19 || //

20 || // / / /

21 || // / / /

22 || // / / /

23 ||

24

24 ⁵ (...continued)
25 ignored the requirements set forth in Jones v. United States, 526
26 U.S. 227 (1999), and Apprendi, supra, that drug quantities must
27 be set forth in the indictment and found by a jury beyond a
28 reasonable doubt. However, even if the Eleventh Circuit erred in
concluding that the district court did not commit plain error in
sentencing, this does not undermine the separate analysis of the
due process issue, which is the sole question currently before
this court.

1 **CONCLUSION**

2 For the reasons stated above, the court concludes

3 (1) that the Booker decision, in its entirety, applies to
4 defendant's resentencing on remand, (2) that such application does
5 not offend the Due Process Clause of the Fifth Amendment, and (3)
6 that defendant's request for immediate release is DENIED.

7 IT IS SO ORDERED.

8 DATED: June 8, 2005.

9 /s/ Frank C. Damrell Jr.

10 FRANK C. DAMRELL, Jr.

11 UNITED STATES DISTRICT JUDGE